

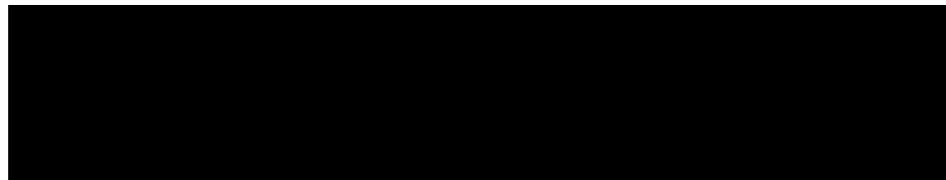
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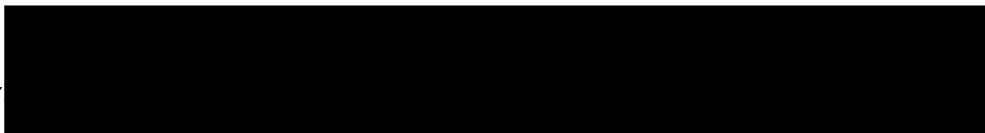
EAC 05 001 50759

Office: VERMONT SERVICE CENTER

Date: JUN 13 2007

IN RE:

Petitioner:  
Beneficiary



PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*Robert P. Wiemann*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a regional office of the Church of God of Prophecy denomination. The denomination's international headquarters is located in Cleveland, Tennessee. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as pastor of the Spanish Church of God of Prophecy in Elizabeth, New Jersey. The director determined that the petitioner had not established its ability to compensate the beneficiary.

On appeal, the petitioner submits reviewed financial statements.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before October 1, 2008, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The sole stated basis for denial concerns the petitioner's ability to pay the beneficiary's salary. The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability

shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

[REDACTED], Overseer of the petitioning region, stated: "We propose to give [the beneficiary] a salary of \$15,000.00 yearly plus free housing and utilities." Elsewhere in this letter, [REDACTED] stated: "The Church of God of Prophecy presently has about one hundred churches throughout the New York metropolitan area, as well as dozens of affiliated Churches throughout the world."

The petitioner's initial submission included bank statements showing that the petitioning region carried a balance of around \$90,000.

On April 11, 2005, the director issued a request for evidence (RFE), including the following instructions:

Submit additional evidence to establish the ability of the religious organization to pay the offered wage as of, September 30, 2004 the filing date of this petition.

Evidence to establish the salaries paid to your religious and non-religious workers should include copies of Quarterly Withholding Statements for at least eight quarters prior to filing.

Submit evidence to establish the net and gross annual income for 2002, 2003 and 2004 for the proposed employer at the address specified in the petition. Such evidence should include one of the following:

1. A photocopy of the most current fiscal year Form 990 or 990 EZ (Return of Organization Exempt From Income Tax; or
2. A photocopy of a current financial statement that has been reviewed or audited by a Certified Public Accountant.

In response, [REDACTED] z, Program Director for Immigration Legal Center of Elizabeth, stated:

As per your letter we are responding to the above with the attached documents:

- Church's Financial Statements for years 2004, 2003, 2002 showing salaries paid at the end of the year for all our ministers (in this point we would like to add that we pay ministers in cash and they take care of their taxes at the end of the year)
- March 2005 Bank Statements of the church
- Copy of papers of incorporation of Church as tax exempt organization
- Copy of beneficiary's taxes for the years 2004, 2003

I hope the above documents are sufficient to show our ability to pay the offered wage since September 2004.

We note [REDACTED]'s repeated use of the pronouns "we" and "our," despite her being an official not of the petitioning region or of any subsidiary church, but of an unaccredited "organization assisting immigrants."<sup>1</sup> The record contains nothing from any church or denominational official to corroborate [REDACTED]'s claims regarding how the Church of God of Prophecy compensates its ministers.

The "Financial Statements" are cash flow reports for the petitioning region, for fiscal years ending on May 31 of 2002 through 2004. There is no indication that these reports were reviewed or audited by a certified public accountant as the director had instructed. The reports include the following information:

Fiscal year ending May 31:	2002	2003	2004
<b>INFLOWS</b>			
FROM Minister Tithes	\$59,617.21	\$66,783.47	\$84,040.09
<b>TOTAL INFLOWS</b>	220,880.14	417,553.67	348,967.07
<b>OUTFLOWS</b>			
<b>UTILITIES:</b>			
Gas & Electric	2,738.90	1,562.93	2,516.22
Telephone	22,74.53	1,342.51	1,616.59
<b>MINISTERIAL EXPENSES:</b>			
Love Offerings	1,045.00	1,735.00	4,750.00
Assistance	10,961.48	n/a	n/a
Ministerial Expenses	1,407.87	10,594.07	14,562.17
Special Ministry	n/a	3,164.74	n/a
Churches Assistance	6,206.00	21,000.00	6,950.00
<b>WAGES:</b>			
Salary	35,433.96	37,995.12	40,222.80
Staff	12,000.00	7,000.00	10,200.00
<b>TOTAL OUTFLOWS</b>	205,775.26	421,672.86	293,632.06

The line "FROM Minister Tithes" has been highlighted in yellow on all three reports. It is not clear who highlighted these line items. The line items do not show compensation of ministers. Rather, they show funds that ministers gave to the petitioning region – hence their inclusion under "INFLOWS" rather than "OUTFLOWS."

The petitioner also submitted copies of additional bank statements, again pertaining to the petitioning region.

The beneficiary's tax returns show that the beneficiary reported \$6,000 in gross income in 2003 and \$15,000 in gross income in 2004.

<sup>1</sup> On Form G-28 Notice of Entry of Appearance as Attorney or Representative, [REDACTED] wrote: "We are an organization assisting immigrants, we'll apply for BIA accreditation once our paperwork is ready." Without such accreditation, we cannot recognize her representation of the petitioner. The issue is moot, however, as the petitioner has since submitted a new, superseding Form G-28 from an attorney.

The director denied the petition, stating that the petitioner failed to submit “copies of quarterly withholding statements” and Form 990 returns. The director further stated that, while the petitioner “submitted cash flow reports . . . , there is no documentation to establish that the reports have been reviewed or audited by a Certified Public Accountant.” The director therefore concluded: “The record does not establish that the religious organization had the ability to pay the offered wage at the time of filing.”

On appeal, [REDACTED] states: “We will send the audited report as soon as we receive them from C.P.A. of church” (*sic*). Subsequently, the petitioner submits newly-prepared financial statements.<sup>2</sup> Cover letters provided with the newly submitted reports make it clear that a certified public accountant reviewed, but did not audit, the information in the reports. While it is at times difficult to compare the old and new documents, because of differences in the way the documents show itemized entries, the newly submitted reports do not match those submitted previously. The amounts listed as “income” and “expenses” do not match those previously shown as “inflows” and “outflows.”

Even if the new reports were consistent with the older ones (which they are not), the petitioner did not submit the documents in response to the RFE, when the director first requested them. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. Because the petitioner waited until the appellate stage to submit this evidence, it cannot overcome the director’s findings or establish eligibility. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Leaving aside the above observations and findings, the director relied on evidentiary standards not found in the regulations. The above-cited regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay “shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.” The petitioner is free to submit other kinds of documentation, but only *in addition to*, rather than *in place of*, the types of documentation required by the regulation. 8 C.F.R. § 103.2(b)(2)(i) states that the non-existence or other unavailability of required evidence creates a presumption of ineligibility. That same regulation also permits the submission of secondary evidence in certain circumstances, if the petitioner is able to demonstrate and explain that primary evidence does not exist or cannot be obtained.

Our review of the record reveals an issue that supersedes all of the discussion above, and necessitates a new decision by the director. We concur with the director that the petitioner, prior to the decision, failed to establish the petitioner’s ability to pay the beneficiary’s proffered salary. The available evidence, however, indicates that the petitioner is not the entity that has been, or would be in the future, responsible for paying that salary.

As we previously noted, [REDACTED] stated in his initial letter: “The Church of God of Prophecy presently has about one hundred churches throughout the New York metropolitan area, as well as dozens of affiliated Churches throughout the world.” [REDACTED] did not indicate how many of these churches are Spanish-

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<sup>2</sup> The cover sheets indicate that the newly prepared statements pertain to the Church of God of Prophecy Northeast Region. Notes within the statements refer to the entity as the Northeast *Spanish* Region, *i.e.*, the petitioning entity.

language churches, but the letterhead of this letter indicates that the petitioner has jurisdiction over Spanish-language churches in nine mid-Atlantic states, including New York, and also the District of Columbia.

The bank statements submitted with the initial filing show that the petitioner issued between 13 and 21 checks per month in late 2003 and early 2004. Therefore, the petitioner did not issue large numbers of weekly or monthly paychecks from that account during that period. Furthermore, the salary amounts shown on the petitioner's unaudited financial documents are not consistent with the payment of a large number of ministers' salaries. If the petitioner took in more than \$84,000 in "minister tithes" in 2003-2004, then it stands to reason that the tithing ministers received a considerably higher aggregate amount of income. Assuming the traditional definition of a "tithe" as a tenth of one's income, the ministers must have collectively earned over \$840,000 that year. If the tithe is a smaller percentage, then the combined total would be higher still. Nevertheless, the petitioner paid far less than \$84,000 in salaries and "Ministerial Expenses" that year, and its entire budget (as initially reported) was less than \$300,000. We must, therefore, conclude that while the petitioning regional organization took in "tithes" from ministers throughout the region, the regional organization itself was not responsible for compensating those ministers. It appears, instead, that the ministers were paid by the respective local churches at which they worked, and those ministers provided financial support to the petitioner, rather than *vice versa*.

8 C.F.R. § 204.5(g)(2) does not require the *petitioner* to establish its ability to pay. Rather, the intending *employer* must establish that ability. Here, the petitioner states that the beneficiary is to work at the Church of God of Prophecy in Elizabeth, New Jersey. It is obvious from the available materials that while the petitioning regional office may exercise ecclesiastical or administrative authority over many churches, including the church in Elizabeth, the petitioner is not financially responsible for paying the ministers or other employees of those churches.

Considering the above information, it is clear that financial documentation regarding the petitioning regional office is irrelevant to the matter at hand. The petitioner must instead demonstrate that the actual church entity responsible for paying the beneficiary's salary is able to meet that financial obligation. That entity would appear to be the church in Elizabeth; if it is not, the petitioner must establish what church entity holds that responsibility. (If the petitioner chooses to claim that the petitioning regional office is, in fact, the entity that has been paying the beneficiary, then strong documentary evidence would be required to support that claim, as the evidence now in the record argues strongly against such a claim.)

Once the petitioner identifies the church entity that has been and will continue to be responsible for the beneficiary's compensation, the petitioner must establish that the responsible entity has been and will continue to be able to pay the beneficiary at the rate specified in the initial filing. This evidence must conform to the regulatory requirements in effect at the time. When establishing past payments, contemporaneous records carry greater weight than after-the-fact claims. For instance, IRS-certified copies of timely-filed tax returns are preferable to returns that are filed late or amended after a request for evidence.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period

of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.